Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

16 February 2012 *

(Appeals — Anti-dumping duties — Regulation (EC) No 954/2006 — Imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine — Regulation (EC) No 384/96 — Article 2(10)(i), Article 3(2), (3) and (5) to (7), Article 18(3) and Article 19(3) — Calculation of the normal value and of the injury — 'Single economic entity' — Rights of the defence — No statement of reasons)

In Joined Cases C-191/09 P and C-200/09 P,

APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 20 and 26 May 2009,

**Council of the European Union**, represented by J.-P. Hix and B. Driessen, acting as Agents, and G. Berrisch, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

**Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT)**, formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, established in Nikopol (Ukraine),

**Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT)**, formerly Nizhnedneprovsky Tube-Rolling Plant VAT, established in Dnipropetrovsk (Ukraine),

represented by P. Vander Schueren, avocat, and N. Mizulin, Solicitor,

applicants at first instance,

**Commission of the European Communities**, represented by H. van Vliet and C. Clyne, acting as Agents,

intervener at first instance,

and

**Commission of the European Communities**, represented by H. van Vliet and C. Clyne, acting as Agents,

appellant,

the other parties to the proceedings being:

* Language of the case: English.

**Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT)**, formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, established in Nikopol,

**Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT)**, formerly Nizhnedneprovsky Tube-Rolling Plant VAT, established in Dnipropetrovsk,

represented by P. Vander Schueren, avocat, and N. Mizulin, Solicitor,

applicants at first instance,

**Council of the European Union**, represented by J.-P. Hix and B. Driessen, acting as Agents, and G. Berrisch, Rechtsanwalt,

defendant at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 18 November 2010,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

## Judgment

1 By their appeals, the Council of the European Union and the Commission of the European Communities (now the European Commission) request the Court of Justice to set aside the judgment of the Court of First Instance of the European Communities (now the General Court) in Case T-249/06 *Interpipe Niko Tube ZAT and Interpipe NTRP* v *Council* [2009] ECR II-383 ('the judgment under appeal') in so far as that Court annulled Article 1 of Council Regulation (EC) No 954/2006 of 27 June 2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, repealing Regulations (EC) No 2320/97 and (EC) No 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and terminating the interim reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and in Croatia and Ukraine (OJ 2006 L 175, p. 4) ('the contested regulation').

2 By their cross-appeal, lodged jointly, Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko tube ZAT), formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT ('Niko Tube'), and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT), formerly Nizhnedneprovsky Tube-Rolling Plant VAT ('NTRP'), also request the Court of Justice to set aside the judgment under appeal in so far as it did not annul the contested regulation in its entirety.

## Legal context

3 The provisions governing the application of anti-dumping measures by the European Community are set out in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12) ('the basic regulation').

4 Article 2(8) and (9) of the basic regulation provides:

'8. The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

…'

5 Under the heading 'Comparison', Article 2(10) of the basic regulation lays down the criteria on the basis of which the institutions of the European Union are to make a fair comparison between the export price and the normal value. That article states, inter alia:

'A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:

…

(i) *Commissions*

An adjustment shall be made for differences in commissions paid in respect of the sales under consideration. The term "commissions" shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.

…'

6 Article 3 of the basic regulation, which concerns the determination of injury, provides:

'…

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

3. With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.

…

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of [the basic regulation]. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

7. Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.

…’

7 Article 18 of the basic regulation, entitled ‘Non-cooperation’, states, inter alia:

‘1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available. Interested parties should be made aware of the consequences of non-cooperation.

…

3. Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

…’

8 Article 19(3) of the basic regulation is worded as follows:

'If it is considered that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information available or to authorise its disclosure in generalised or summary form, such information may be disregarded unless it can be satisfactorily demonstrated from appropriate sources that the information is correct ...'

9 Article 20 of that regulation, entitled 'Disclosure', states:

'...

2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

...

4. Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

...'

**Background to the dispute**

10 Paragraphs 5 to 20 of the judgment under appeal, reproduced below, set out the facts of the dispute at the origin of the case:

'5. [Niko Tube and NTRP] are Ukrainian producers of seamless tubes and pipes. [Niko Tube and NTRP] are connected with two sales companies: SPIG Interpipe ["SPIG"], established in Ukraine, and Sepco SA ["Sepco"], established in Switzerland.

6. Following a complaint lodged on 14 February 2005 by the Defence Committee of the Seamless Steel Tube Industry of the European Union, the Commission initiated an anti-dumping proceeding concerning imports of seamless pipes and tubes, of iron or steel, originating in Croatia, Romania, Russia and Ukraine, pursuant to Article 5 of the basic regulation. The Commission also initiated two interim reviews pursuant to Article 11(3) of the basic regulation on the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and in Croatia and Ukraine. The notice of initiation of those proceedings was published on 31 March 2005 (OJ 2005 C 77, p. 2).

7. The investigation into dumping and resulting injury concerned the period from 1 January to 31 December 2004 ("the investigation period"). Examination of the trends relevant for assessing injury covered the period from 1 January 2001 to the end of the investigation period.

8. In view of the large number of Community producers supporting the complaint, the Commission proceeded, pursuant to Article 17 of the basic regulation, to select five Community producers for the purposes of the investigation. That sample initially comprised the following five Community producers: Dalmine SpA, Benteler Stahl/Rohr GmbH, Tubos Reunidos SA, Vallourec & Mannesmann France SA ("V & M France") and V & M Deutschland GmbH ("V & M Germany"). When Benteler Stahl/Rohr decided not to cooperate with the investigation, the Commission replaced it with Rohrwerk Maxhütte GmbH.

9. By letters of 6 June and 14 July 2005 [Niko Tube and NTRP], [SPIG] and Sepco sent the Commission their replies to the anti-dumping questionnaire. On-site verifications took place at [Niko Tube's and NTRP's] premises and those of [SPIG] from 17 to 26 November 2005.

10. On 27 February 2006, the Commission sent [Niko Tube and NTRP] the first disclosure document detailing the facts and considerations on the basis of which it was proposing to adopt definitive anti-dumping measures. By letter of 22 March 2006, [Niko Tube and NTRP] officially challenged the Commission's findings as set out in the first disclosure document. They claimed that the Commission had wrongly included data on products which were not manufactured by them, that the Commission compared the normal value and export price at a different level of trade, which is contrary to the introductory part of Article 2(10) of the basic regulation, and that, by treating Sepco as an importer and constructing its export price, the Commission infringed Article 2(9) of the basic regulation.

11. On 24 March 2006, a hearing was organised by the Commission, in the presence of [Niko Tube and NTRP], in order to address the issue of the calculation of the dumping margin and their offer of a price undertaking. On 30 March 2006 another hearing, concerned with the injury, took place.

12. By fax of 3 April 2006, [Niko Tube and NTRP] requested information from the Commission regarding the cooperation of the Community industry with the investigation.

13. On 24 April 2006, the Commission adopted its second disclosure document. In that document the Commission rejected the request for the exclusion of [certain] products [not produced by Niko Tube and NTRP] falling under product control number ("PCN") KE4 from the calculation of the normal value. It carried out an adjustment to Sepco's sale prices, no longer on the basis of Article 2(9) of the basic regulation, but under Article 2(10)(i) of the basic regulation. Finally, in that document, the Commission provided some information regarding the cooperation of the Community industry.

14. By fax of 26 April 2006, [Niko Tube and NTRP] reminded the Commission that the data provided in response to the anti-dumping questionnaire and verified by the Commission officials demonstrate that the atomic pipes falling under PCN KE4 were not produced by [Niko Tube and NTRP].

15. [Niko Tube and NTRP] submitted their full observations on the second disclosure document to the Commission by letter of 4 May 2006.

16. By letter of 30 May 2006, the Commission explained to [Niko Tube and NTRP] its reasons for not accepting their offer of undertaking submitted on 22 March 2006.

17. On 7 June 2006 the Commission adopted and made public its proposal for a Council regulation imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, repealing Council Regulations (EC) No 2320/97 and (EC) No 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel

originating, inter alia, in Russia and Romania and terminating the interim reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and in Croatia and Ukraine.

18. By fax received by [Niko Tube and NTRP] on 26 June 2006 at 19.06 hrs, the Commission replied to the arguments raised by [Niko Tube and NTRP] in the fax of 26 April and the letter of 4 May 2006, save for the argument concerning lack of cooperation from the Community industry. By letter sent to [Niko Tube and NTRP] on 16 June 2006, which they received on 27 June 2006, the Commission replied to the [Niko Tube's and NTRP's] comments with regard to the support from the Community industry for the proceeding.

19. On 27 June 2006, the Council adopted [the contested regulation].

20. By [the contested regulation], the Council imposed anti-dumping duties of 25.1% on imports of seamless pipes and tubes, of iron or steel, from [Niko Tube and NTRP].'

**The procedure before the General Court and the judgment under appeal**

11 By application lodged at the Registry of the General Court on 8 September 2006, Niko Tube and NTRP brought an action seeking the annulment of the contested regulation.

12 By document lodged at the Registry on 1 December 2006, the Commission applied to intervene in support of the form of order sought by the Council. By order of 16 January 2007, the President of the Fifth Chamber of the General Court granted leave to intervene. By letter of 27 February 2007, the Commission informed the General Court that it waived its right to submit a written statement in intervention but would take part in the oral hearing.

13 By their first plea in law in support of their application for annulment Niko Tube and NTRP claimed that, by taking account, in the calculation of the normal value, of data concerning pipes that were not manufactured by them, the Council had made a manifest error of assessment and had infringed the principle of non-discrimination.

14 In their second plea, Niko Tube and NTRP submitted that, in using, for the purposes of determining injury, the data for the five European Union producers selected in the sample, whereas those producers had not fully and entirely cooperated, the Council had infringed Article 3(2), (3), (5), (6) and (7) and Article 19(3) of the basic regulation and the principle of non-discrimination.

15 In their third plea, Niko Tube and NTRP claimed that, on account of the lack of full and entire cooperation of the European Union producers taken as the sample, the level of support for the complaint had been below the minimum specified in the regulation of 25% of European Union production. The Council had thus infringed Article 5(4) of the basic regulation by not terminating the anti-dumping proceeding.

16 By their fourth plea in support of their action, Niko Tube and NTRP claimed that by deducting from Sepco's sale price an amount corresponding to the commission which an agent, working on a commissions basis, would have charged, by way of adjustment in comparing the normal value and the export price, the Council had made a manifest error of assessment in applying Article 2(10)(i) and the first paragraph of Article 2(10) of the basic regulation.

17 In their fifth plea, Niko Tube and NTRP claimed that the circumstances of the Council's rejection of their offer of undertaking constituted an infringement of the principle of non-discrimination.

18 Finally, in their sixth plea, which was divided into five parts, Niko Tube and NTRP alleged infringement of the rights of the defence and/or of the obligation to state reasons in the context of their arguments relating to (i) the taking into account of the tubes not manufactured by them for the purposes of calculating the normal value, (ii) the lack of cooperation from the Community industry, (iii) the adjustment made to the export price charged by Sepco, and (iv) the rejection of their offer of undertaking and the treatment of sales costs, administrative expenses and other general costs of SPIG.

19 The General Court considered that examination of those six pleas needed to be rearranged by reference to the facts to which they related. Thus, under the following headings, it examined (i) the calculation of the normal value, (ii) the consequences of the lack of replies to the questionnaire from companies affiliated to the European Union producers, (iii) the adjustment made to Sepco's sale price, (iv) Niko Tube's and NTRP's offer of an undertaking, and (v) the treatment of sales costs, administrative costs and other general expenses of SPIG.

20 By the judgment under appeal, the General Court rejected most of the pleas and arguments put forward by Niko Tube and NTRP.

21 However, the General Court upheld, in paragraphs 177 to 190 of the judgment under appeal, with respect to NTRP, the part of the fourth plea alleging the existence of a manifest error of assessment on the part of the Council in so far as it adjusted the export price charged by Sepco, pursuant to Article 2(10)(i) of the basic regulation, for the export price charged by Sepco in the context of transactions concerning the pipes manufactured by NTRP.

22 The General Court also upheld, in paragraphs 200 to 211 of the judgment under appeal, the part of the sixth plea raised by Niko Tube and NTRP alleging breach of the rights of the defence in the context of the adjustment made by the Council pursuant to Article 2(10)(i) of the basic regulation.

23 Consequently, the General Court annulled Article 1 of the contested regulation in so far as the anti-dumping duty fixed for exports to the Community of the products manufactured by Niko Tube and NTRP exceeded that which would have been applicable had the export price not been adjusted for a commission when sales had taken place through the intermediary of the affiliated trader, Sepco. The General Court dismissed the action brought by Niko Tube and NTRP as to the remainder.

## Procedure before the Court of Justice and forms of order sought by the parties

24 On 29 May 2009 the Council lodged an appeal at the Registry of the Court of Justice against the judgment under appeal. That appeal was registered as Case C-191/09 P.

25 On 27 May 2009 the Commission lodged an appeal at the Registry of the Court of Justice against the same judgment. That appeal was registered as Case C-200/09 P.

26 By order of the President of the Court of 15 of July 2009, Cases C-191/09 P and C-200/09 P were joined for the purpose of the written procedure, the oral procedure and the judgment.

27 By its appeal in Case C-191/09 P, the Council claims that the Court of Justice should:

— set aside the judgment under appeal to the extent that the General Court, first, annulled Article 1 of the contested regulation in so far as the anti-dumping duty fixed for exports towards the European Community of the products manufactured by Niko Tube and NTRP exceeded that which would have been applicable had the export price not been adjusted for a commission when sales had taken place through the intermediary of the affiliated trader, Sepco and, second, ordered the Council to bear its own costs and to pay one quarter of the costs incurred by Niko Tube and NTRP;

— dismiss the action for annulment brought by Niko Tube and NTRP in its entirety; and

— order Niko Tube and NTRP to pay the costs of the appeal and of the procedure before the General Court.

28 By its appeal in Case C-200/09 P, the Commission claims that the Court of Justice should:

— set aside point 1 of the operative part of the judgment under appeal;

— dismiss the action for annulment brought by Niko Tube and NTRP in its entirety;

— order Niko Tube and NTRP to pay the costs incurred by the Commission in the present appeal.

29 In their responses, lodged in Cases C-191/09 P and C-200/09 P, Niko Tube and NTRP contend that the Court of Justice should:

— dismiss the Council's and Commission's appeals as inadmissible in part and in any event as wholly unfounded;

— confirm the judgment under appeal in so far as it upholds in part the action for annulment brought by Niko Tube and NTRP, annuls the contested regulation in so far as the anti-dumping duty fixed for exports towards the European Community of the products manufactured by Niko Tube and NTRP exceeded that which would have been applicable had the export price not been adjusted for a commission when sales had taken place through the intermediary of the affiliated trader, Sepco;

— uphold the order as to costs made in the judgment under appeal and order the Council and the Commission to pay the costs incurred before the Court of Justice.

30 In the context of that response, Niko Tube and NTRP lodged a cross-appeal in Cases C-191/09 P and C-200/09 P, in which they claim that the Court of Justice should:

— set aside the judgment under appeal in so far as the General Court did not annul the contested regulation in its entirety and in so far as it ordered Niko Tube and NTRP to bear three quarters of their costs at first instance;

— annul the contested regulation in its entirety;

— order the Council and the Commission to pay the costs incurred at both instances.

31 In its reply to that cross-appeal, the Council contends that, in Case C-191/09 P, the Court of Justice should:

— dismiss the cross-appeal;

— in the alternative, refer the case back to the General Court;

— in the further alternative, dismiss the action;

— order Niko Tube and NTRP to pay the costs of the cross-appeal.

32 In its reply to the cross-appeal, the Commission contends that, in Case C-200/09 P, the Court of Justice should:

— dismiss the cross-appeal;

— in the alternative, refer the case back to the General Court;

— order Niko Tube and NTRP to pay the costs.

**The main appeals**

33 In support of its appeal, the Council raises seven grounds of appeal. The first four grounds concern the adjustment made pursuant to Article 2(10)(i) of the basic regulation.

34 In support of its appeal, the Commission raises four grounds of appeal, the first three of which are similar to the first four grounds raised by the Council.

35 As a result of their similarity, it is thus appropriate to examine jointly the first four grounds of appeal raised by the Council and the first three raised by the Commission.

*The first four grounds of the Council's main appeal and the first three grounds of the Commission's main appeal*

Arguments of the parties

36 In its first ground of appeal, the Council submits that the General Court erred in applying, by analogy, in the context of Article 2(10)(i) of the basic regulation, the case-law relating to the 'single economic entity' concept. The General Court also erred in referring to that case-law when ascertaining whether the institutions of the European Union had proved that the conditions necessary for making that adjustment under Article 2(10)(i) were satisfied. The Council maintains that it follows from settled case-law of the Court of Justice that the determination of normal value, the determination of the export price and the comparison of those prices are governed by separate sets of rules, which must be applied separately. The Council also relies on the Court's case-law in affirming that the 'single economic entity' concept relates exclusively to certain specific situations concerning the calculation of normal value; the Court has confirmed, in particular, that in those cases the institutions were correct to calculate the normal value on the basis of sales made by affiliated companies responsible for sales on the domestic market to independent buyers.

37 The Council observes that the question in the present case does not concern the determination of the export price but the adjustment made under Article 2(10)(i) of the basic regulation, namely the comparison between the normal value and the export price. The General Court merely stated that the case-law on the 'single economic entity' concept applied by analogy to the calculation of the export price, but then applied that case-law in order to decide the conditions in which an adjustment under Article 2(10)(i) of that regulation could be made. That constitutes a further error of law. In addition, it claims that the General Court also breached its obligation to state the reasons on which its decision was based, since it did not justify, to the requisite legal standard, its reasons for applying by analogy the 'single economic entity' concept to the calculation of the export price.

38 By its second ground of appeal, the Council maintains that the General Court infringed the rules relating to the burden of proof applicable to the institutions of the European Union when they make an adjustment under Article 2(10)(i) of the basic regulation and that it therefore applied the wrong standard of review when evaluating the institutions' decision to make an adjustment on that basis. To justify an adjustment on the basis of that provision of the basic regulation, a specific pre-existing factor needs to affect price comparability. It follows from the case-law of the Court of Justice that it is for an applicant seeking annulment of an anti-dumping measure to prove that the institutions based their findings on incorrect facts or made a manifest error of assessment. In the present case the General Court did not carry out such an examination and wrongly decided that the factors set out in the

Commission's fax of 26 June 2006 did not support the finding that an adjustment ought to have been made pursuant to Article 2(10)(i) of the basic regulation. In that regard, the General Court replaced the institutions' assessment with its own assessment.

39 In the context of its third ground of appeal, the Council maintains that, after making the two errors of law referred to above, the General Court examined the institutions' decision to make the adjustment provided for in Article 2(10)(i) of the basic regulation on the basis of the wrong legal test. The General Court examined the institutions' decision solely by reference to the three factors set out in the Commission's fax of 26 June 2006. The Council considers that the General Court was wrong to reject its argument that Niko Tube and NTRP made direct sales within the European Union by reference to the case-law on the 'single economic entity' concept. The Council also submits that the General Court misunderstood the Commission's argument relating to SPIG's participation in the export activities of Niko Tube and NTRP. In addition, it claims that the General Court incorrectly applied the case-law on the 'single economic entity' concept in determining whether the link between Sepco and NTRP precluded the finding that Sepco carried out functions comparable to those of an agent working on a commission basis. Lastly, the General Court made an error of law because it assessed each of the factors identified by the institutions in isolation.

40 By its fourth ground of appeal, the Council maintains that the General Court erred in finding that the institutions had made a manifest error of assessment in applying the first paragraph of Article 2(10) of the basic regulation to the export sales of Niko Tube and NTRP on the ground that the Council had made an adjustment to Sepco's export price in the context of transactions concerning pipes manufactured by NTRP. The errors of law made by the General Court concerning the interpretation and application of Article 2(10)(i) also vitiate the findings made in paragraphs 196 and 197 of the judgment under appeal.

41 The Commission submits that the General Court made two errors of law when it applied, by analogy, the 'single economic entity' concept, which concerns the calculation of the normal value, to the determination of the export price. In the first place, the General Court provides no reasoning whatsoever as to why the 'single economic entity' concept would also apply by analogy for the purposes of the determination of the export price. On the contrary, it follows from the settled case-law of the Court of Justice that the concept was formulated with the aim of taking account, for the purposes of determining the normal value when calculating the dumping margin, of certain specific situations on the exporters' home market. In the second place, at paragraph 177 et seq. of the judgment under appeal, the General Court went directly against the case-law which it cited in support of its decision. It follows from that case-law that the 'single economic entity' concept, which was developed with the aim of determining more adequately the normal value of products sold by an operator on the home market, cannot be transposed to the determination of that same trader's export price when it exports like products to the European Union. On the contrary, it follows from the consistent case-law of the Court of Justice that, where an exporter sells a product in the European Union through a sales subsidiary, the export price is determined, just like the normal value, by taking into account the first sale to an independent purchaser. However, the adjustments provided for in the basic regulation can and must be applied to that export price and the institutions do not bear any particular burden of proof in that regard.

42 As regards the second ground of appeal raised by the Commission, relating to the burden of proof and the limits of the General Court's judicial review, the Commission maintains that the General Court made several errors of law. The General Court required the institutions to comply with a particularly high burden of proof in the sphere of measures to protect trade, for which they have a wide discretion. The General Court infringed the rules relating to the burden of proof by deciding that it was necessary to verify 'whether the institutions have proved, or at least adduced evidence, that the functions of Sepco are not those of an internal sales department but comparable to those of an agent working on a commission basis'. It follows from the case-law of the Court of Justice that the institutions acted correctly in taking the price charged by Sepco to the first independent buyer in the

European Union as a starting point and then applying to that price the adjustments provided for in Article 2(10)(i) of the basic regulation. Rather than demonstrating, as it ought to have done in order to justify the annulment in part of the regulation, that the institutions made a manifest error in assessing the facts in this case, the General Court wrongly considered that it followed from the case-law on the 'single economic entity' concept that the institutions have a particularly high burden of proof when they must apply an adjustment on the basis of Article 2(10)(i) of the basic regulation. Furthermore, the General Court's finding that the institutions could not apply the adjustment in question is incompatible with the finding which it makes, in paragraphs 213 and 214 of the judgment under appeal, that the Commission's fax of 26 June 2006 contains a detailed statement of the reasons for applying that adjustment.

43 As regards the Commission's third ground of appeal, brought against the General Court's finding that the institutions infringed the first paragraph of Article 2(10) of the basic regulation, the Commission contends that it has demonstrated, in the two preceding grounds of appeal, that the General Court erred in law in finding, with respect to pipes manufactured by NTRP, that the adjustment based on that provision had not been validly made. In the view of the General Court, the adjustment made pursuant to that provision is deemed to re-establish the symmetry between normal value and export price. The General Court expressly considered that the plea alleging an infringement of the first paragraph of Article 2(10) of the basic regulation was indissociable from the plea alleging an infringement of Article 2(10)(i) of that regulation. The Commission submits that, if the first and second pleas are well founded, the adjustment was thus made correctly, with the result that, by finding that the Council and the Commission had infringed the first paragraph of Article 2(10) of the basic regulation, the General Court also committed an error of law, all the more so, in the Commission's view, since the General Court refrained from examining the Council's argument that, as SPIG was associated both in domestic sales and in export sales and as the adjustment covered only Sepco's additional participation in export sales, the operation established a symmetry and not an asymmetry.

44 In response to those grounds of appeal of the Council and the Commission, Niko Tube and NTRP submit that the first ground of appeal of those institutions, which is common to both appeals and concerns the 'single economic entity' concept, is inadmissible, since although both the Council and the Commission had the opportunity to challenge the relevance of that concept for the application of the adjustment made pursuant to Article 2(10)(i) of the basic regulation, they chose not to do so in their pleas in law and in their written arguments before the General Court.

45 According to Niko Tube and NTRP, the 'single economic entity' concept applies to the determination of the export price both before and after the adjustment made pursuant to Article 2(10)(i) of the basic regulation. The General Court properly stated the reasons on which its findings on this point were based. The question of the existence of control and the sharing of production and sales activities, and therefore of the existence of a single economic entity, is a separate question and arises before and independently of the question as to the specific impact of the existence of such an entity on the calculation of the normal value and export price before and after the adjustments made pursuant to Article 2(10) of the basic regulation. In the view of Niko Tube and NTRP, the 'single economic entity' concept merely recognises an economic reality, that is to say, it depicts the respective roles and functions of the affiliated distinct entities. As the General Court recognises that the determination of the normal value and export price is governed by different specific rules, it is normal that it should speak of applying 'by analogy' the concept that the sharing of activities within a group of legally distinct entities does not prevent those entities from constituting a single economic entity. The General Court merely recognises that in general, whether it is a question of determining the export price or the normal value, it is impossible to ignore economic realities.

46 Furthermore, according to Niko Tube and NTRP, the fact that the consequences of a single economic entity may differ for the determinations of normal value and export price does not prevent a broader application of the consistent case-law relating to that concept, which this Court has thus far examined

only in the context of a limited number of disputes. In addition, under Article 2(10)(i) of the basic regulation, where the institutions of the European Union propose to deduct various expenses, such as the trader's margin, incurred by an affiliated sales company, they are required to justify such deduction by demonstrating that the sales company is exercising functions similar to those of an agent operating on a commission basis. Where the sales company forms a single economic entity with the producer-exporter and performs the functions of an internal sales department, there is no basis for the view that it performs the functions of an agent operating on a commission basis. In the submission of Niko Tube and NTRP, for that purpose it is necessary to specify the functions of the affiliated sales company and the existence of 'control' thereof by the producer-exporter. Where control exists and the functions of the affiliated sales company are those of an internal export sales department, there is a single economic entity relationship and not a relationship that is similar to a principal-agent relationship, with the consequence that there is no basis for subtracting the trader's margin pursuant to Article 2(10)(i) of the basic regulation. Lastly, the case-law cited by the Council and the Commission in support of that ground of appeal does not preclude the 'single economic entity' concept, applied by the Court of Justice when determining the normal value, from also being applied in the context of the examination as to whether the functions of the trader are comparable to those of an agent working on a commission basis. It cannot follow from the fact that the Courts of the European Union have thus far been called upon to adjudicate on the existence of a 'single economic entity' only from the aspect of the determination of the normal value that that concept does not apply to the determination of the export price. Niko Tube and NTRP submit that the precise subject-matter of the present case has never been raised before the Court of Justice.

47 In so far as concerns the Council's second and third grounds of appeal, which coincide with the Commission's second ground, Niko Tube and NTRP deal with them jointly. With respect to the second ground, they maintain that the General Court did not err when it interpreted the burden of proof on the institutions and that it did not go beyond the limits of its powers of judicial review with respect to the contested regulation. As regards the third ground, Niko Tube and NTRP maintain that the General Court did not apply an incorrect legal test when it evaluated the institutions' decision to make an adjustment under Article 2(10)(i) of the basic regulation. That article expressly provides that it is for the institution which proposes to make that adjustment to demonstrate or at least adduce evidence that in reality the trader is carrying out functions similar to those carried out by an agent acting on a commission basis. In that regard, although the institutions disputed Niko Tube's and NTRP's arguments that Sepco was an internal export sales department, the Council and Commission did not, however, furnish any relevant evidence to support the claim that Sepco had actually acted as an agent. In the submission of Niko Tube and NTRP, the institutions in effect consider that the fact that a sales company which is affiliated to or otherwise controlled by a producer-exporter, sells the product concerned within the European Union, is sufficient to support the automatic conclusion that that company acts as an agent. Such a conclusion would deprive Article 2(10)(i) of the basic regulation of any practical effect.

48 In the view of Niko Tube and NTRP, it is clear that the General Court took into consideration and evaluated all the arguments of the Council and the Commission and the available information before concluding that the institutions had committed a manifest error of assessment in that they had not presented sufficient evidence that Sepco had operated as an agent working on a commission basis.

49 As regards the Council's fourth ground of appeal and the Commission's third, Niko Tube and NTRP consider that the General Court was justified in concluding that the institutions had committed a manifest error of assessment in applying the first paragraph of Article 2(10) of the basic regulation. As such, the adjustment maintained or created an asymmetry as contemplated by the General Court in paragraph 195 of the judgment under appeal.

Findings of the Court

50 By their seven grounds of appeal, the Council and the Commission are, in essence, calling into question (i) the fact that, in paragraphs 177 to 179 of the judgment under appeal, the case-law on the calculation of the normal value, concerning the 'single economic entity' concept, was applied by analogy to export price adjustments provided for in Article 2(10) of the basic regulation, and (ii) the rule on the burden of proof, set out in paragraph 180 of the judgment under appeal, and applied in paragraphs 182 et seq. thereof, pursuant to which the institutions must, where they consider that they are required to make an adjustment, provide evidence of the existence of the factors for which the adjustment was made.

51 In that regard, it should be noted, first of all, that different rules apply for the determination of normal value and export price and therefore the sales, general and administrative expenses need not necessarily be treated in the same way in both cases. However, any differences between the two values may be taken into account under the adjustments provided for in Article 2(10) of the basic regulation (see, to that effect, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 63, 70 and 73, and Case C-178/87 *Minolta Camera* v *Council* [1992] ECR I-1577, paragraph 12).

52 In paragraph 177 of the judgment under appeal, the General Court held that 'according to consistent case-law concerning the calculation of the normal value, but applicable by analogy to the calculation of the export price, the sharing of production and sales activities within a group formed by legally distinct companies does not alter the fact that one is dealing with a single economic entity which organises in that manner a series of activities which are carried out, in other cases, by an entity which is also a single entity from the legal point of view (see, by analogy, Case 250/85 *Brother Industries* v *Council* [1988] ECR 5683, paragraph 16; Case C-175/87 *Matsushita Electric* v *Council* [1992] ECR I-1409, paragraph 12; Case C-104/90 *Matsushita Electric Industrial* v *Council* [1993] ECR I-4981, paragraph 9)'.

53 The dispute before the General Court related to the adjustment made to the export price, in accordance with Article 2(10)(i) of the basic regulation. In that regard, it is apparent from the wording and broad scheme of Article 2(10) of that regulation that an adjustment to the export price or to the normal value may be made only to take account of differences in relation to factors which affect both prices, such as commissions, that is to say differences in commissions paid in respect of the sales under consideration, and which thus affect their comparability, in order to ensure that the comparison is made at the same level of trade. Therefore, the question of an export price adjustment, in the context of the application of Article 2(10) of the basic regulation, requires, first of all, an examination at the level of trade at which the export price was determined.

54 In that regard, it should also be noted that there is nothing in the wording of Article 2(10) of the basic regulation and, in particular, Article 2(10)(i) which may prevent the 'single economic entity' concept from being applied to the final determination of the export price in order for a fair comparison to be made under that article. Thus, if a producer exports his products to the European Union via a legally separate undertaking, but over which it holds economic control, there is no overriding legal or economic reason preventing those two traders from being regarded as a 'single economic entity'.

55 It is not disputed that the 'single economic entity' concept was developed for the purposes of determining the normal value. The General Court thus rightly set out, in paragraphs 178 and 179 of the judgment under appeal, the specific situations in which it may be concluded that there is such an entity for the calculation of the normal value. However, it does not follow from those considerations that that concept is to be applied only in relation to the domestic markets of producer-exporters. If a producer exports his products to the European Union through the intermediary of a legally separate undertaking, but over which it holds economic control, the requirement of a finding reflecting the economic reality of the relations between that producer and that sales company militates more in favour of applying the 'single economic entity' concept when calculating the export price.

56 It follows from the foregoing that, in calculating the export price, the General Court did not err in applying, by analogy, the case-law relating to the 'single economic entity' concept which applies, in principle, to the calculation of the normal value.

57 As regards the burden of proving the reality of the factor on the basis of which the adjustment in question was claimed or made, the General Court held, in paragraph 180 of the judgment under appeal, that, 'just as a party who is claiming adjustments under Article 2(10) of the basic regulation in order to make the normal value and the export price comparable for the purpose of determining the dumping margin must prove that his claim is justified, it is incumbent upon the institutions, where they consider that they must make an adjustment, to base their decision on direct evidence or at least on circumstantial evidence pointing to the existence of the factors for which the adjustment was made, and to determine its effect on price'.

58 It should be noted, in that regard, that, in accordance with the case-law of the Court of Justice, if a party claims adjustments under Article 2(10) of the basic regulation in order to make the normal value and the export price comparable for the purpose of determining the dumping margin, that party must prove that its claim is justified (see, to that effect, Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 33; Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, paragraph 45; and Case 260/84 *Minebea* v *Council* [1987] ECR 1975, paragraph 43).

59 In addition, pursuant to Article 2(10) of the basic regulation, where the normal value and the export price as established are not on such a comparable basis, due allowance, in the form of adjustments, is to be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and thus price comparability.

60 In those circumstances, as noted by the Advocate General in point 79 of his Opinion, the burden of proving that the specific adjustments listed in Article 2(10)(a) to (k) of the basic regulation must be made lies with those who wish to rely on them, irrespective of who they are.

61 Thus, where a producer claims that an adjustment of the normal value, in principle downward, or an adjustment of the export price, logically upward, applies, it is for that operator to indicate and to establish that the conditions for granting such an adjustment are satisfied. Conversely, as the General Court rightly found, where, as in the present case, the Council and the Commission consider that it is appropriate to apply a downward adjustment of the export price, on the ground that a sales company affiliated to a producer carries out functions comparable to those of an agent working on a commission basis, it is the responsibility of those institutions to adduce at the very least consistent evidence showing that that condition is fulfilled.

62 In paragraph 184 of the judgment under appeal, the General Court concluded that the factors put forward by the Commission to justify the adjustment under Article 2(10)(i) of the basic regulation could not be regarded as sufficiently convincing and could not therefore be regarded as evidence establishing the existence of the factor on the basis of which the adjustment was made and enabling its impact on price comparability to be determined. In terms of that decision, the Council and the Commission consider that the General Court went beyond the limits of its powers of judicial review.

63 It is settled case-law of the Court of Justice that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions of the European Union enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. The judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraphs 40 and 41).

64 It should be recalled that, according to settled case-law, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see Case C-535/06 P *Moser Baer India* v *Council* [2009] ECR I-7051, paragraph 31).

65 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see *Moser Baer India* v *Council*, paragraph 32).

66 It is apparent from paragraphs 184 to 190 of the judgment under appeal that, in accordance with that case-law, the General Court reviewed the legal classification by the Council and the Commission of Niko Tube's and NTRP's situation. In that context, it found that the three factors set out in the Commission's fax of 26 June 2006 did not constitute evidence to support the conclusion reached by those institutions that Sepco met the conditions to enable an adjustment to be made pursuant to Article 2(10)(i) of the basic regulation, at least as regards the transactions concerning pipes produced by NTRP.

67 In those circumstances, the General Court did not impose any particular burden of proof on the institutions, other than that of showing that the conditions for granting such an adjustment were satisfied.

68 It must also be found that the General Court's review of the three factors set out in the Commission's fax of 26 June 2006 and the relevant evidence in the file, referred to in paragraph 188 of the judgment under appeal, which aimed to assess whether the institutions furnished evidence that Sepco's functions were comparable to those of an agent working on a commission basis so as to be able to make the adjustment at issue, did not constitute a new assessment of the facts replacing that made by the institutions. That review thus did not encroach on the broad discretion of the institutions in the field of commercial policy, justified by the complexity of economic, political and legal situations which they are required to examine, but was restricted to showing whether that evidence was able to support the conclusions reached by the institutions.

69 In the light of the foregoing, the first four grounds of the Council's main appeal and the first three grounds of the Commission's main appeal must be rejected.

*Grounds five to seven of the Council's main appeal and the fourth ground of the Commission's main appeal*

Arguments of the parties

70 The Council raises three grounds of appeal against the judgment under appeal that call into question the conclusion therein that Niko Tube's and NTRP's rights of defence have been infringed. Accordingly, by its fifth ground of appeal, the Council maintains that the General Court's interpretation of the disclosure requirements is too strict. In its view, the question whether communication of the legal basis for an adjustment made pursuant to Article 2(10)(i) of the basic regulation is sufficient to allow an exporter to exercise its rights of defence or whether additional information must be provided cannot be settled in the abstract but can be resolved only by reference

to the circumstances of the case. The General Court therefore ought to have examined whether, in the light of the specific circumstances of the case, the mere communication of the legal basis for the adjustment was sufficient or not.

71 By its sixth ground of appeal, the Council contends that the General Court did not respect the conditions for the application of the criterion on the basis of which it examined whether, if the factors set out in the Commission's fax of 26 June 2006 had not been communicated late, Niko Tube and NTRP could have had 'a chance, even a slim chance, of causing the administrative procedure to lead to a different result', enabling it to be determined whether the procedural irregularity had an impact on their ability to protect their interests. The General Court made an error of law, in that it failed to examine whether, following that late communication, Niko Tube and NTRP had really been deprived of the possibility to submit arguments or observations which could have resulted in a different outcome of the administrative procedure. According to the Council, if the General Court had applied that test correctly, it would have found that the arguments put forward by Niko Tube and NTRP were essentially the same as those submitted in the proceedings before the Commission before they received the Commission's fax of 26 June 2006.

72 By its seventh ground of appeal, the Council considers that the appraisal of the evidence on which the General Court relied, in paragraphs 185 to 188 of the judgment under appeal, for its finding that there had been a breach of the rights of defence of Niko Tube and NTRP is vitiated by several errors of law, as is apparent from the examination of the first three grounds of appeal. The General Court's finding, in paragraph 209 of the judgment under appeal, that Niko Tube and NTRP 'have established that an earlier communication of the factors contained in the [Commission's] fax of 26 June 2006 would have enabled them to make that same demonstration before the adoption of the contested regulation and, by so doing, support the assertion that the Commission did not have any tangible evidence allowing it to proceed with the adjustment at issue' is therefore also vitiated by an error. Similarly, the General Court's reasoning is contradictory in that it found that there had been a breach of the rights of the defence with respect to the sales by Niko Tube and NTRP, whereas it held, in paragraphs 188 and 189 of the judgment under appeal, that they had not established that Sepco was under NTRP's control. Thus an earlier communication of the three factors mentioned in the Commission's fax of 26 June 2006 would not have provided Niko Tube and NTRP with a chance of obtaining a different outcome with respect to the sales made by NTRP through the intermediary of Sepco.

73 By its fourth ground of appeal, the Commission submits that the General Court applied criteria which were excessively stringent and therefore unjustified to conclude that Niko Tube's and NTRP's rights of defence had been infringed. In the Commission's view, Niko Tube and NTRP were fully informed, for the purpose of enabling them to exercise their rights of defence, of the precise reasons why the Commission intended to apply the adjustment in question. They made observations concerning the adjustment proposed in the letter of 4 May 2006. The General Court confused the substantive question of the legality of the adjustment with the question of respect for the rights of defence of Niko Tube and NTRP. The fact that the General Court considered that an adjustment had been applied unlawfully does not mean that there was a breach of the rights of defence of Niko Tube and NTRP. The General Court did not sufficiently distinguish between what is required of the institutions, in terms of grounds, at the stage of the adoption of the final legal act and what is required during the administrative procedure prior to that adoption. At the stage of the adoption of the final legal act, the final reasoning must be communicated to the addressees and it must comply with Article 253 EC. At the earlier stage, what is required is that the traders are given sufficient information to enable them to exercise their rights of defence. Therefore, the General Court incorrectly concluded, as a result of the fact that the reasoning was more extensive at the stage of the final legal act, that the information provided prior to its adoption necessarily prevented the operators concerned from exercising their rights of defence.

74 In so far as concerns the three grounds of appeal put forward by the Council, which correspond to the Commission's fourth ground, Niko Tube and NTRP examine them together. In their view, the General Court correctly decided that their rights of defence had been infringed in so far as the companies ought to have been given the opportunity to make known their views on the truth and relevance of all the facts and circumstances alleged in support of an adjustment. Where the grounds underlying that decision are communicated only at the very end of the administrative procedure, to the extent that its communication coincides with the closure of the administrative procedure, that requirement is not met. Compliance with the principle of the right to be heard requires that the undertakings concerned be given the opportunity during the administrative procedure to make known their views on the truth and relevance of the circumstances alleged and also on the documents used by the Commission to support its claim alleging an infringement. The General Court's review should be exercised solely on the basis of the factual evidence gathered during the administrative procedure and which led to the adoption of the measure at issue in the action for annulment. If the review undertaken by the General Court focused on factual evidence other than that gathered during the administrative procedure, that would imply that Niko Tube and NTRP were not in a position to make full use of their rights of defence during the proceedings before the General Court. Furthermore, if Niko Tube had been informed in a timely manner of the criteria which the institutions had really taken into consideration in their assessment, it would have been able to focus its arguments on those criteria during the administrative procedure and influence the outcome.

Findings of the Court

75 The General Court upheld the plea raised by Niko Tube and NTRP, alleging an infringement of the rights of the defence, to the extent that it concerned the adjustment made pursuant to Article 2(10)(i) of the basic regulation, in so far as, if, prior to the adoption of the contested regulation, the Commission had communicated the factors contained in its fax of 26 June 2006 to Niko Tube and NTRP, the latter could have been able, in good time, to formulate arguments which they were not able to formulate as a result of the Commission's delay in communicating the relevant information. They would thus have been better able to defend themselves and, possibly, cause the administrative procedure to have a different result.

76 In paragraph 64 of the judgment under appeal, the General Court rightly noted the case-law of the Court of Justice in relation to compliance with the rights of the defence of the parties in anti-dumping investigations. According to that case-law, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraph 17).

77 It should be noted that respect for the rights of the defence is of crucial importance in anti-dumping investigations (see, to that effect, *Al-Jubail Fertilizer* v *Council*, paragraphs 15 to 17; by analogy, Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 55; and Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2009] ECR I-9147, paragraph 93).

78 In particular, according to the case-law of the Court of Justice, Niko Tube and NTRP cannot be required to show that the Commission's decision would have been different in content but simply that such a possibility cannot be totally ruled out, since they would have been better able to defend themselves had there been no procedural error (see *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, paragraph 94 and the case-law cited).

79 However, the existence of an irregularity relating to the rights of the defence can result in annulment of the contested regulation only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome and thus in fact adversely affected the rights of defence of Niko Tube and NTRP (see *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, paragraph 107).

80 It is apparent from the file submitted to the Court of Justice that the General Court rightly noted, in paragraph 203 of the judgment under appeal, that it was not until the second final information document, dated 24 April 2006, that Niko Tube and NTRP were informed that, concerning sales towards the Community in which Sepco was an intermediary, the adjustment made had in fact been carried out pursuant to Article 2(10)(i) of the basic regulation, and not pursuant to Article 2(9) thereof, as had been stated in the first final information document; however, in the subsequent second document, the Commission did not supply any justification as to why Article 2(10)(i) of the basic regulation was applicable in this case. Those are the circumstances in which, by letter of 4 May 2006, Niko Tube and NTRP informed the Commission that it was required to show that Sepco's activities were similar to those of an agent working on a commission basis.

81 The General Court found that it was only by a fax of 26 June 2006, that is one day prior to the adoption of the contested definitive anti-dumping regulation, that the Commission provided, for the first time, the grounds justifying, in its view, the fact that Sepco's activities were comparable to those of an agent and that the adjustment made on the basis of Article 2(10)(i) of the basic regulation was thus founded. That finding is not disputed in the present case.

82 In that regard, the fact that the General Court relied, in paragraph 209 of the judgment under appeal, on the conclusions which it drew in paragraphs 185 to 188 of that judgment, according to which the three factors in the Commission's fax of 26 June 2006 could not be regarded as evidence establishing, first, that Sepco carried out functions comparable to those of an agent working on a commission basis and, second, that Sepco and NTRP did not constitute a single economic entity, cannot call into question the General Court's finding of fact that Niko Tube and NTRP were informed for the first time of the reasoning behind the legal basis for the adjustment made only one day prior to the adoption of the contested anti-dumping regulation.

83 As stated in paragraph 78 above, it is sufficient for a finding that the rights of the defence have been affected that Niko Tube and NTRP would have been better able to defend themselves had the procedural irregularity not occurred.

84 Before the General Court, Niko Tube and NTRP were able to raise arguments, in the present case, which the General Court deemed to be founded and on the basis of which, in paragraphs 190 and 243 of the judgment under appeal, it upheld the part of the fourth plea raised by those parties in the context of their action for annulment, alleging a manifest error on the part of the Council in its application of Article 2(10)(i) of the basic regulation and, as a result, annulled the contested regulation in part. As the General Court rightly noted, in paragraph 209 of the judgment under appeal, that circumstance shows that an earlier communication of the factors contained in the Commission's fax of 26 June 2006 would have enabled Niko Tube and NTRP to raise, with those institutions and prior to the adoption of the contested regulation, the same arguments as those on which the General Court's annulment decision was based and, by so doing, to support the assertion that the Commission did not have any tangible evidence allowing it to make the contested adjustment.

85 It is true that, in paragraphs 185 to 190 of the judgment under appeal, the General Court upheld the part, referred to above, of the fourth plea of annulment only in respect of the relationship between Sepco and NTRP and rejected it as regards the relationship between Sepco and Niko Tube. However, had the evidence at issue been communicated earlier during the administrative procedure, it would not have been for the General Court but for the Council and the Commission to evaluate its effect on those two relationships, in the light of the arguments raised from that point by Niko Tube and NTRP.

Thus, in spite of its own substantive findings in paragraphs 185 to 190 of the judgment under appeal, the General Court was able to find in paragraphs 210 and 211 of that judgment, without contradicting itself and by upholding the sixth plea of annulment raised by Niko Tube and NTRP at first instance, that, in the absence of the irregularity committed by the Commission, not only NTRP but also Niko Tube would have been better able to defend itself and, possibly, cause the administrative procedure to have a different result.

86 It follows from the foregoing that Niko Tube and NTRP were not properly heard at any stage of the administrative procedure on the pleas which they sought to raise against the planned adjustment.

87 Therefore, the Court must reject grounds five to seven of the Council and the fourth ground of the Commission, raised in support of their respective appeals, alleging that the rights of defence of Niko Tube and NTRP were not infringed.

88 Consequently, the main appeals must be dismissed in their entirety.

**The cross-appeal**

89 By their cross-appeal, Niko Tube and NTRP submit that the General Court was wrong to reject the first, second and fourth pleas in law which they raised in their action at first instance. Niko Tube and NTRP raise three grounds of appeal to that effect. The first ground is raised against the General Court's decision that the Council did not determine the normal value on the basis of a manifest error of assessment and in breach of the principle of non-discrimination, in that that institution had taken into account, according to Niko Tube and NTRP, products which they did not manufacture when it calculated the dumping margin. By their second ground of appeal, Niko Tube and NTRP submit that the General Court made an error of law in deciding that the material injury had been determined in accordance with Article 3 of the basic regulation. Finally, the third ground of appeal raised by Niko Tube and NTRP challenges the General Court's finding that Sepco acted on behalf of Niko Tube as an agent working on a commission basis.

*The first ground of the cross-appeal*

Arguments of the parties

90 The first ground of appeal raised by Niko Tube and NTRP is divided into five parts. The first part alleges an infringement of the right to be heard. By the second part they submit that the General Court exceeded the limits of its power of judicial review. The third part is based on the fact that the General Court failed to address one of the pleas raised by Niko Tube and NTRP. By the fourth part of the ground of appeal they submit that the General Court made a manifest error of assessment of the Commission's duty to exercise due care. Finally, by the fifth part of the ground of appeal they allege that the General Court distorted the clear meaning of the evidence submitted to it.

91 By the first part of their first ground of appeal, Niko Tube and NTRP submit that the General Court made an error of law and infringed their rights of defence in confirming, as well founded, the institutions' decision not to exclude, in calculating the dumping margin, atomic pipes, that is to say products which they claimed, on the basis of documentary evidence, not to manufacture. In that regard, the General Court was wrong to take account of the new evidence submitted by the Council for the first time at first instance. Consequently, as Niko Tube and NTRP submit in the context of the second part of their first ground of appeal, the General Court acted well beyond the permitted standard of review and made an error of law in admitting facts and new and additional explanations provided by the institutions.

92 On that latter point, Niko Tube and NTRP submit, by the third part of their first ground of appeal, that those explanations and claims were made by the Council out of time in that they did not form part of the file compiled for the administrative procedure and must, therefore, be rejected so as to respect the rights of the defence. The General Court took note of that plea in the report for the hearing but failed to address it in the judgment under appeal.

93 In addition, Niko Tube and NTRP submit, in the context of the fourth part of their first ground of appeal, that the General Court wrongly held, in paragraphs 52 and 53 of the judgment under appeal, that the Commission showed all the required diligence in examining the data which they supplied concerning the sale of those atomic pipes. While the institutions raised 10 separate arguments in support of their claim that they had complied with their duty of due diligence, the General Court considered that only two of those arguments actually justified a 'legitimate concern' on their part. According to Niko Tube and NTRP, the General Court's decision that the institutions satisfied their duty of due diligence, while also finding that only two of the 10 arguments raised by the institutions were founded, is not based on a reasonable assessment and is, consequently, erroneous and thus unfounded.

94 Finally, in the context of the fifth part of their first ground of appeal, Niko Tube and NTRP submit, still in relation to the data which they sent to the institutions concerning the sale of atomic pipes, that the General Court wrongly considered that that data, which was provided during the administrative procedure, 'may have been a source of confusion for the Commission officials charged with the investigation', in so far as that decision was based on inadmissible arguments which the institutions raised for the first time before the General Court and which, in any event, are erroneous and unfounded. In those circumstances, the General Court's conclusions, in paragraph 53 of the judgment under appal, pursuant to which the normal value was determined in a reasonable manner and the Commission complied with its obligation to examine, with care and impartiality, all the relevant factors of the case, are manifestly erroneous.

95 In response to those grounds of appeal, the Council and the Commission contend that Niko Tube and NTRP have not proven the existence of any of the five complaints challenging the General Court's finding, in the judgment under appeal, that the normal value was determined in a reasonable manner. Consequently, they contend that the first ground of appeal raised in support of the cross-appeal must be rejected.

Findings of the Court

96 Niko Tube and NTRP submit that the General Court made an error of law and infringed their rights of defence in that, in paragraphs 47 to 55, 59 and 60 of the judgment under appeal, it took account of new evidence, namely the new grounds submitted by the Council and the Commission to justify their refusal to exclude atomic pipes from their calculation of the normal value, and new facts put forward in support of those new grounds, which had not been communicated to Niko Tube and NTRP during the administrative procedure.

97 In paragraph 67 of the judgment under appeal, the General Court considered that, without it being necessary to rule on the essential character of the considerations concerning the exclusion of the atomic pipes falling under PCN KE4 and technical standard TU 14 3P 197 2001 from the calculation of the normal value, contrary to what Niko Tube and NTRP claimed, no new element of fact or reasoning had been communicated to them by the letters which they had indeed received on 27 June 2006, namely the day on which the contested regulation was adopted.

98 In particular, Niko Tube and NTRP submit that, during the administrative procedure, the Council and the Commission did not take account of the fact that the atomic pipes did not correspond to the product at issue, that is to say the product concerned by the dumping allegations. According to Niko

Tube and NTRP, they did not manufacture that type of pipe. In addition, at no point during the administrative procedure did the Council or the Commission claim that the list of purchases produced by Niko Tube and NTRP made it possible to rebut that argument. In their view, the investigation file does not mention a failure to cooperate on their part in identifying the supplier, yet that failure was attributed to Niko Tube and NTRP by the institutions and used in support of their decision. The argument of the institutions that they were not in a position to ascertain the accuracy of the statement that the atomic pipes were not manufactured by Niko Tube and NTRP on the ground that that evidence was based on new data, cannot however be upheld, since, in reality, that statement on the part of Niko Tube and NTRP was based, in their view, on information which they had provided beforehand. In that regard, Niko Tube and NTRP state that, in paragraph 48 of the judgment under appeal, the General Court itself considered that the questionnaire which SPIG had to complete concerned only sales to the European Union and that the 'DMsales' list, concerning sales to the Ukrainian market, was supplied only on a purely voluntary basis.

99 In that respect, in paragraphs 45 and 46 of the judgment under appeal, the General Court considered that the fact that the sales lists of Niko Tube and NTRP did not mention the pipes manufactured in accordance with technical standard TU 14 3P 197 2001 was an indication, for the Commission, that they had not sold those atomic pipes, even to their associated sales company, SPIG. The General Court also found, in paragraph 46 of the judgment under appeal, that Niko Tube's and NTRP's lists of production costs, headed 'DMcop' and 'ECcop', did not mention any of the products manufactured pursuant to technical standard TU 14 3P 197 2001. The General Court inferred from this that those lists proved that none of the products listed had been manufactured by Niko Tube and NTRP pursuant to technical standard TU 14 3P 197 2001. Nevertheless, the General Court noted, in paragraphs 47 and 48 of the judgment under appeal, that the list of sales on the national market, headed 'Dmsales', produced by SPIG in the context of its reply to the questionnaire sent to it by the Commission, referred none the less to six transactions concerning atomic pipes falling under PCN KE4, manufactured pursuant to technical standard TU 14 3P 197 2001, and supplied solely by NTRP.

100 Even though it was apparent from the file submitted to the General Court that those six transactions, in reality, concerned only the Ukrainian market, the General Court concluded, first, in paragraph 50 of the judgment under appeal, that the Commission none the less had contradictory information, or, at the very least, information the validity of which could be called into question and, second, in paragraph 51 of the judgment under appeal, that Niko Tube and NTRP failed to dispel any doubts in that regard by adducing proof that the six transactions in question concerned purchases by SPIG from an independent supplier.

101 The first two parts of the ground of appeal under consideration, alleging an infringement of the rights of the defence and that the General Court exceeded the limits of its judicial review, are both based on the premise that the General Court should have regarded the grounds raised by the institutions of the European Union for the first time before it, to support the rejection of the request by Niko Tube and NTRP for exclusion of atomic pipes falling under PCN KE4 from the calculation of the normal value, as having been submitted out of time, since those grounds were submitted for the first time before that court and did not form part of the administrative procedure.

102 In that regard, it is sufficient to note, as does the Advocate General in point 182 of his Opinion, that it is clear from paragraphs 47 to 55, 59 and 60 of the judgment under appeal, that the General Court, in examining the pleas for annulment, alleging a manifest error of assessment and an infringement of the principle of non-discrimination, merely took into consideration factors arising from the documents exchanged during the administrative procedure.

103 In particular, in determining whether the Council had committed a manifest error of assessment in rejecting the request by Niko Tube and NTRP for exclusion of atomic pipes falling under PCN KE4 from the calculation of the normal value and the dumping margin on the ground that they did not

manufacture them, the General Court examined, inter alia, the grounds on the basis of which that request had been rejected, particularly in the light of the factual context in which those grounds had been adopted. In doing so, the General Court simply placed that rejection decision into its context, noting that SPIG's list of suppliers and purchases mentioned just one supplier of atomic pipes falling under PCN KE4, namely NTRP, which could have had an impact on the claim that Niko Tube and NTRP did not manufacture those pipes. Such a context and, in particular, the fact, noted in paragraph 50 of the judgment under appeal, that the Commission had contradictory information on the manufacture, by NTRP, of atomic pipes falling under PCN KE4, could certainly not be unknown to Niko Tube and NTRP. The General Court in fact found, in paragraph 51 of the judgment under appeal, that Niko Tube and NTRP had sent to the Commission documents which gave rise to that confusion, namely documents submitted as invoices supposed to be related to the six transactions concerning atomic pipes falling under PCN KE4 which were said to be wrongly mentioned in SPIG's sales list.

104 It is apparent from the foregoing that the answers provided by the General Court to the two pleas examined in paragraphs 47 to 55, 59 and 60 of the judgment under appeal were not based on grounds raised out of time by the institutions of the European Union.

105 The third part of the first ground of appeal alleges a failure by the General Court to respond to the plea of Niko Tube and NTRP seeking to have removed from the discussion, for being out of time and to preserve their rights of defence, the Council's explanations and allegations contained in its defence. It is settled case-law of the Court of Justice that the obligation to state reasons does not require the General Court to provide an account that follows exhaustively and point by point all the reasoning articulated by the parties to the case. The reasoning may be implicit on condition that it enables the persons concerned to know why the measures in question were taken (see Joined Cases C-101/07 P and C-110/07 P *Coop de France Bétail et Viande* v *Commission* [2008] ECR I-10193, paragraph 75).

106 In the light of the foregoing considerations, it must be held that the argument at issue was implicitly rejected by the General Court, since it examined and rejected the substance of the pleas of annulment alleging a manifest error of assessment and infringement of the principle of non-discrimination which are based, as Niko Tube and NTRP themselves submit, on the grounds which they regard as having been submitted out of time.

107 As regards the fourth part of the ground of appeal relating to Niko Tube's and NTRP's argument that the General Court committed a manifest error of assessment in rejecting, in paragraph 55 of the judgment under appeal, the plea raised by Niko Tube and NTRP relating to the institutions' duty of due diligence when they are required to determine the normal value, Niko Tube and NTRP assert that the General Court was required to examine whether the Commission had evaluated with the required level of diligence, thus in a reasonable manner, the evidence at its disposal, and not whether the way in which the Commission had evaluated the evidence was coherent.

108 In that regard, it should be noted that the question whether the General Court could, properly in law, conclude from those facts that the institutions had failed neither in their duty to act diligently nor in their duty to state reasons is a question of law subject to the review of the Court of Justice on appeal (*Moser Baer India* v *Council*, paragraph 34).

109 In that context, it should be noted, first, that the General Court did not set out a list of 10 factors, but pointed out, in paragraphs 33 to 37 of the judgment under appeal, the five groups of reasons which led the institutions to reject the request to exclude atomic pipes falling under PCN KE4 from the calculation of the normal value and of the dumping margin.

110 The General Court did indeed note in paragraph 46 of the judgment under appeal that Niko Tube and NTRP had furnished evidence showing that they did not manufacture atomic pipes falling under PCN KE4. However, the General Court then observed, in paragraphs 47 and 48 of the judgment under

appeal, that, according to the information submitted by SPIG, NTRP had supplied atomic pipes falling under PCN KE4 manufactured pursuant to technical standard TU 14 3P 197 2001. In addition, contrary to the submissions of Niko Tube and NTRP, the General Court did not hold 'unfounded', in paragraph 48 of the judgment under appeal, the argument that SPIG referred only to NTRP as the sole supplier of those pipes. On the contrary, the General Court held that 'SPIG … did not commit any error by making no mention … of a supplier other than NTRP', given that the pipes at issue had apparently been resold on the Ukrainian market.

111 Next, the fact that the General Court did not rule specifically on some of the factors listed in the cross-appeal of Niko Tube and NTRP cannot be interpreted as a finding that the General Court considered those factors 'irrelevant'. On the contrary, the General Court could certainly rule, for legitimate reasons of procedural economy, that it was not incumbent upon it, in the context of examining a plea alleging a manifest error of assessment which it was for Niko Tube and NTRP to establish, to check all the arguments presented by the institutions in support of their conclusion, since some of the reasons put forward were sufficient to support that conclusion.

112 Niko Tube and NTRP themselves admit that the General Court found to constitute 'legitimate concerns' the fact that they failed to present evidence clearly establishing that the pipes in question had been bought from an independent third party and not from NTRP and the fact that, during the on-the-spot check, the Commission had not raised the issue of atomic pipes falling under PCN KE4, since Niko Tube and NTRP had not yet drawn up their request for the exclusion of those pipes. Essentially, it is on the basis of those two factors that the General Court concluded that the institutions had not committed an error in rejecting Niko Tube's and NTRP's request to exclude from the calculation of the normal value and the dumping margin the atomic pipes falling under PCN KE4. The argument by which Niko Tube and NTRP dispute that assessment and attempt to call it into question before the Court of Justice is clearly not an issue falling within the jurisdiction of the Court on appeal, since it concerns the General Court's assessment of the facts.

113 It is clear from the foregoing that, even though, in reasoning its substantive conclusion, the General Court accepted only two of the factors put forward by the institutions of the European Union, that does not mean that the institutions failed to examine carefully and impartially all the evidence which had been sent to them during the administrative procedure.

114 As regards the fifth part of the first ground of appeal, alleging a distortion of the evidence, in so far as Niko Tube and NTRP submit that, contrary to the General Court's conclusion in paragraphs 49 and 50 of the judgment under appeal, their reply to the questionnaire sent by the Commission did not contain contradictory information, it should be noted, first of all, that it was not after the examination of just the replies given by Niko Tube and NTRP to that questionnaire but also of the replies given by their affiliated sales company, SPIG, that the General Court found, in paragraph 50 of the judgment under appeal, that the Commission had contradictory information. In coming to that conclusion, the General Court relied, in particular, on the finding, made in paragraphs 47 and 48 of the judgment under appeal, that, according to the information provided by SPIG, NTRP had supplied atomic pipes falling under PCN KE4 manufactured pursuant to technical standard TU 14 3P 197 2001. In doing so, it did not distort the replies given by Niko Tube and NTRP to the Commission's questionnaire.

115 Next, it should be noted, in the light of the foregoing, that the General Court also did not distort the evidence in the file either by coming to the conclusion, set out in paragraph 52 of the judgment under appeal, that the Commission had shown all the required diligence.

116 Finally, as regards Niko Tube's and NTRP's argument challenging the General Court's finding, in paragraph 51 of the judgment under appeal, that the failure to translate into English SPIG's purchase invoices was merely a pretext for finding that Niko Tube and NTRP had not attempted to dispel the Commission's doubts in relation to the contradictory replies, it must be noted that Niko Tube and NTRP have not reproduced or annexed the relevant invoices to their cross-appeal with a view to

demonstrating the General Court's alleged distortion of those documents, but merely referred the Court of Justice to an annex to the Council's defence, produced before the General Court, containing a copy of those documents.

117 In the light of the settled case-law of the Court of Justice, pursuant to which an alleged distortion of the facts or evidence must be obvious from the documents on the Court's file without there being any need to carry out a new assessment of the facts and the evidence (see Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3713, paragraph 54, and Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 67), those circumstances are sufficient to reject that complaint.

*The second ground of the cross-appeal*

118 The second ground of the cross-appeal is divided into nine parts. Niko Tube and NTRP maintain that the General Court (i) made an error of law in rejecting the second plea relied on in the application in that it failed to examine whether Article 3(2) of the basic regulation had been infringed, (ii) it made an error of law in its assessment of the application of Article 3(2) of the basic regulation, (iii) it made an error of law in its assessment of the application of Article 18(3) of the basic regulation, (iv) it committed an error of law in that it did not fully examine all of the criteria under Article 18(3) of the basic regulation, (v) it infringed their right to be heard, (vi) it exceeded the limits of its powers of judicial review, (vii) it did not provide sufficient grounds for its decision and made an error of assessment, (viii) it failed to address the additional plea raised by Niko Tube and NTRP and (ix) it made an error of law in its assessment of the conditions for the application of Article 19(3) of the basic regulation.

119 By the ninth part of the second ground of their cross-appeal, Niko Tube and NTRP submit that the General Court made an error of law in rejecting the plea alleging an infringement of Article 19(3) of the basic regulation.

Arguments of the parties

120 By the first part of the second ground of their cross-appeal, Niko Tube and NTRP submit that the General Court failed to examine their plea alleging that the institutions infringed Article 3(2) of the basic regulation. In their view, the determination of injury, for the purposes of that provision, in this case was made on the basis of patchy evidence, given the lack of cooperation of a certain number of production and distribution companies which, as a result, were not integrated into the panel representing the industrial sector of the European Union, on the basis of which the institutions evaluated the material injury. Consequently, a correct application of Article 3(2) of the basic regulation should have led the General Court to find that, in those circumstances, the material injury could not have been lawfully determined, in the light of the lack of positive evidence, within the meaning of that provision. In that regard, the General Court infringed Article 3(2) of the basic regulation by limiting its examination of the conformity of the data provided with Article 18(3) of that regulation with a view to determining whether that data was relevant for the evaluation of the injury. The General Court should have decided that the institutions had made a manifest error of assessment in establishing the material injury on the basis of the data which did not cover a significant part of the European Union industry, since, had the General Court applied the correct criterion, it would have found that the portion of undertakings in the relevant industrial sector of the European Union which did not cooperate represented 12% of that sector's overall sales.

121 By the second part of their second ground of appeal, they submit that the General Court made an error of law when it held that a production company affiliated with complainant producers is in principle not required to cooperate in an investigation and that examination of the prices charged between a complainant and its affiliated trader is sufficient to establish whether the performance by that trader is relevant for the determination of material injury and thus whether the trader has to submit a separate

reply to the questionnaire. According to Niko Tube and NTRP, the General Court's analysis would enable a European Union producer to choose simply what companies in its group would not support the complaint and would not be required to provide data. In that context, the General Court made an error of law in its assessment of the application of Article 3(2) of the basic regulation.

122 By the third part of their second ground of appeal, Niko Tube and NTRP maintain that the General Court made an error of law in its review of the legality of the Council's and Commission's assessment of the application of Article 18(3) of the basic regulation. In the view of Niko Tube and NTRP, in order to determine whether the missing information '[is] not such as to cause undue difficulty in arriving at a reasonably accurate finding' within the meaning of that provision, two things must be examined: (i) the effect of non-cooperation by the affiliated companies 'as a function of production and sales of the related sampled Community producer'; and (ii) the 'total magnitude of non-cooperation as a function of the total production and sales of the Community industry'. In the present case the General Court wrongly confined itself to examining the relevance of the material injury findings on the sole basis of the magnitude of non-cooperation of individual affiliated companies by reference to total European Union industry sales and production.

123 By the fourth part of their second ground of appeal, Niko Tube and NTRP claim, in substance, that the General Court did not properly ascertain whether Article 18(3) of the basic regulation was applicable, since it did not examine, for each company, each of the four criteria set out in that article. Furthermore, when the General Court assessed whether the four requirements were satisfied in the case under assessment, it concentrated solely on two injury indicators, namely sales data and, to a certain extent, production data. However, the provisions on injury lay down 15 injury indicators, all of which must be taken into consideration in an injury analysis. In those circumstances, the General Court's findings on the cooperation of the sampled producers, and therefore on the determination of injury in the contested regulation, as expressed at paragraphs 97 to 108 and 112 of the judgment under appeal, are incorrect.

124 By the fifth part of their second ground of appeal, Niko Tube and NTRP maintain that the General Court infringed their rights of defence because, first, it based its judgment on facts and explanations which had not been communicated to them during the administrative procedure and on which they were not given the opportunity to comment and, second, certain facts established by the General Court cannot be traced to the file developed before that Court.

125 By the sixth part of their second ground of appeal, they maintain that the General Court exceeded the limits of its power of judicial review. In the present case, the General Court wrongly allowed the institutions to adduce additional and unforeseen factual statements and explanations and then carried out a fresh review of a newly-reconstituted file.

126 By the seventh part of their second ground of appeal, Niko Tube and NTRP submit that the General Court failed to justify its decision to the requisite legal standard, in so far as it failed to adequately explain what led it to rely, in support of its decision, on one set of figures as opposed to another, such as those put forward by Niko Tube and NTRP.

127 By the eighth part of their second ground of appeal, they maintain that the General Court failed to address a plea raised by them, pursuant to which the explanations and allegations cited by the Council in the defence, with respect to the second plea raised in the action, are not supported by the investigation file, with the result that the Council infringed their rights of defence.

128 According to the ninth part of their second ground of appeal, the General Court made an error of law in its review of the legality of the application of Article 19(3) of the basic regulation. Niko Tube and NTRP submit that the General Court wrongly concluded in paragraphs 101, 107 and 108 of the judgment under appeal, that irrespective of the failure of Productos Tubulares, Tenaris West Afrika and VMOG United Kingdom to reply to the questionnaire sent to them by the Council, the latter did

not make a manifest error of assessment. In addition, the General Court failed to consider whether the non-confidential summaries of the confidential data supplied by VMOG Germany, Acecsa, Almesa and various Dalmine companies had given to Niko Tube and NTRP, during the administrative procedure, 'sufficient knowledge of the essential content' of the relevant data. The General Court made an error of law in that it failed to observe the clear and unambiguous wording of Article 19(3) of the basic regulation or to examine whether the sales and production data of the individual Community producers which had not cooperated, which had been illegally withheld from the non-confidential file by the Council and the Commission, could be verified from other appropriate sources. Had the General Court done so, it would have established that there was no appropriate source known to Niko Tube and NTRP and that it was therefore inappropriate to rely on non-confidential data that was improperly withheld in that it resulted in a direct and wrongful interference with the companies' rights of defence. In addition, the question whether the appropriate disclosure of the information might have altered the course of the administrative procedure should be examined from the point of view of the party whose rights of defence are infringed, and due consideration should be given to the fact that that party might have been in a position to comment on the truth or the relevance of the information concerned had it been properly disclosed.

129 According to the Council, by the first part of the second ground of their cross-appeal, Niko Tube and NTRP maintain that the General Court failed to examine the infringement, alleged by them, of Article 3(2) of the basic regulation. In the Council's submission, the General Court, after finding that the institutions had complied with Article 18(3) of that regulation, proceeded to consider whether, overall, the calculation of the injury margin was affected by the missing replies to the questionnaire sent by the institutions to various companies belonging to that industry sector of the European Union, and concluded that it was not. Consequently, Niko Tube and NTRP cannot maintain that the General Court confined its review to an examination of compliance with Article 18(3) of the basic regulation and that it did not take account of the impact of the missing questionnaire replies on the determination of injury.

130 The Council submits, in addition, that the institutions examined all the European Union producers. However, although some affiliated companies did not submit a reply to the questionnaire, that had no impact on either the data relating to each European Union producer or the data for the European Union industry as a whole.

131 In the Council's view, the argument of Niko Tube and NTRP that the determination of the material injury was not supported by any positive evidence and that the General Court's was erroneous since the missing information related to sales representing 10% of total sales of the European Union industry, is inadmissible. The Council maintains that Niko Tube and NTRP fail to show that the General Court manifestly distorted the evidence before it since they do not indicate precisely the evidence alleged to be distorted or the error of assessment which led to that distortion.

132 The Council submits that, so far as concerns the second part of the second ground of appeal of Niko Tube and NTRP, the General Court held that, if a company does not support a complaint, 'the information concerning it should not, … in principle, be taken into account in analysing the position of the [European Union] industry …, unless such omission would distort that determination'. Thus, in the Council's view, Niko Tube and NTRP are wrong to claim that the General Court's analysis would allow a European Union producer simply to pick and choose which companies within its group 'will not support the complaint and will not need to provide data'.

133 In response to the third part of the second ground of appeal the Council states that Article 18(3) of the basic regulation confers a wide discretion on the European Union institutions and does not require them to express, in each case, the 'effect' or the 'magnitude' of the non-cooperation as a 'function' of the sales and production of the related sampled producer concerned or that industry sector of the European Union industry as a whole.

134 In response to the fourth part of the second ground of appeal, the Council maintains that Article 18(3) of the basic regulation cannot be read in isolation but must be read in conjunction with paragraph 1 of that article, which sets out the conditions under which the institutions may opt to disregard information. In the light of the General Court's finding that the missing information related, at most, to 10% of total sales of the European Union industry and that the anti-dumping duty was based on the dumping margin, which was significantly lower than the injury margin, the Council maintains that the General Court was correct to find that the Council had not made a manifest error of assessment in holding that the missing information had not distorted the determination of injury and had not infringed Article 3(2), (3), (5), (6) and (7) of the basic regulation.

135 In response to the fifth part of the second ground of appeal, the Council contends that those allegations are based on an incorrect understanding by Niko Tube and NTRP of the relationship between the administrative investigation and judicial review. Furthermore, the facts and explanations set out at paragraph 158 of the cross-appeal are all based on evidence gathered during the administrative investigation. Lastly, the allegation that disclosure during the investigation was insufficient has already been examined and rejected by the General Court and Niko Tube and NTRP do not refer to any error of law vitiating those findings. In reality, Niko Tube and NTRP are challenging the findings of fact made by the General Court, which means that they must demonstrate that that Court distorted the evidence before it and, consequently, identify precisely the items of evidence that are alleged to have been distorted. The assertions set out at paragraph 189 of the cross-appeal are not supported by any evidence and are therefore inadmissible.

136 In the Council's submission, the sixth part of the second ground of appeal, whereby it is alleged that the General Court acted outside its jurisdiction by exceeding the limits of judicial review, corresponds to the second part of the first ground of the cross-appeal and is also inadmissible.

137 The Council claims that the seventh part of the second ground of appeal raised by Niko Tube and NTRP, pursuant to which they claim that the General Court did not state sufficient reasons for its judgment and made an error of assessment, is inadmissible since, first, the arguments put forward in the context of the seventh part do not meet the degree of precision required in an appeal and, second, since Niko Tube and NTRP dispute the findings of fact made by the General Court they must show that it distorted the clear sense of the evidence before it and, accordingly, identify the specific pieces of evidence that it is alleged to have distorted. Moreover, the General Court is not required to respond to each and every argument put forward by the parties during the proceedings, especially where the argument is implicitly rejected by the General Court's findings.

138 In response to the complaint which Niko Tube and NTRP raised in the context of the eighth part of their second ground of appeal, alleging that the General Court failed to address an additional plea which they had raised, the Council contends that those arguments are unfounded because, even though no such plea was raised, the General Court none the less considered whether there had been an infringement of the rights of defence of Niko Tube and NTRP in that regard and correctly concluded that there had not.

139 Finally, the Council submits that the arguments raised by Niko Tube and NTRP in the context of the ninth part of the ground of appeal, according to which the General Court made an error of law in its assessment of the lawfulness of the application of Article 19(3) of the basic regulation, are inadmissible in part and in any event unfounded. The Council observes that the findings made in paragraphs 101, 107 and 108 of the judgment under appeal are not incorrect and in particular are not based on late reasoning and evidence. The argument that the General Court did not assess whether the non-confidential summaries of the questionnaire replies of a number of companies were sufficient is a new plea, which is therefore inadmissible.

140 In the Council's submission, the argument that the General Court infringed Article 19(3) of the basic regulation is inadmissible because Niko Tube and NTRP fail to identify clearly which elements of the judgment under appeal they are challenging. In any event, it is the scope of Article 19(3), as interpreted by the parties, which is legally wrong. The words 'may be disregarded' make plain that the institutions are not required to disregard information for which no confidential information was submitted or information for which a request for confidential treatment was not considered warranted. On the contrary, they have broad discretion in that regard. A party can seek annulment of an anti-dumping measure on the ground that the Commission took confidential information into consideration only if it can show that in doing so the Commission infringed that party's rights of defence.

141 The final argument that, in the context of that part of the plea, the General Court applied the wrong test when assessing whether the disclosure of information might have led to a different outcome is, in the Council's submission, unfounded. The Council maintains that a procedural irregularity can entail the annulment of a measure only where there is a possibility that, in the absence of that irregularity, the administrative procedure could have resulted in a different outcome, with the result that that irregularity in fact adversely affected the complainant's rights of defence. In that regard, it is not sufficient for Niko Tube and NTRP to make an abstract and general assertion, in the present case, that they would have been able to submit new arguments had they received those summaries during the administrative investigation.

142 The Commission supports the Council's position. In particular, in the context of the first part of the second ground of appeal raised by Niko Tube and NTRP, concerning the alleged refusal to examine a breach of Article 3(2) of the basic regulation, the Commission maintains that the General Court did not confine its review to compliance of the contested regulation with Article 18(3) of the basic regulation. In the Commission's submission, the General Court assessed the impact of the non-submission of questionnaire replies by affiliated companies on the determination of injury. In addition, even though Niko Tube and NTRP suggest that the fact that certain affiliated companies did not respond to the questionnaire had the effect that a 'significant portion' of that industry sector of the European Union was disregarded in the examination of injury, according to the Commission, that had no impact on either the data relating to individual producers or the data relating to the European Union industry sector as a whole. In addition, the argument that the General Court did not apply the correct test because it disregarded the absence of data relating to 12% of sales by the European Union industry, is, the Commission submits, inadmissible. Niko Tube and NTRP fail to demonstrate that the General Court manifestly distorted the evidence produced, nor have they established the error of assessment that led to the alleged distortion. Furthermore, the distinction drawn between the 'Community industry' and 'complainant Community producers' is unfounded, since the term 'Community industry' refers to the Community industry as defined in point 140 of the contested regulation, that is to say, to the complainant Community producers.

143 The Commission notes that, by the third part of the second ground of appeal, Niko Tube and NTRP claim that, in order to assess whether the missing information does not 'cause undue difficulty in arriving at a reasonably accurate finding' within the meaning of Article 18(3) of the basic regulation, it is necessary to examine two points: (i) the effect of non-cooperation of affiliated companies as 'a function of production and sales of the related sampled Community producer'; and (ii) the 'total magnitude of non-cooperation as a function of the total production and sales of the Community industry'. The Commission submits that Article 18(3) of the basic regulation confers a wide discretion on the institutions when they assess whether incomplete information none the less allows them to arrive at a reasonably accurate finding. Niko Tube and NTRP do not explain why, in the present case, the General Court ought to have expressed the missing information as a function of total production and sales of that industry sector of the European Union industry. Their only argument as to why it would be necessary to compare the missing data with the sales and production volume of the

affiliated producer is that the General Court carried out such a comparison for Acecsa. However, that does not mean, in the Commission's view, that the General Court made an error of law by not carrying out the same analysis for the other companies.

144 The Commission maintains that the fourth part of the second ground of appeal, concerning the alleged refusal to examine all the criteria referred to in Article 18(3) of the basic regulation, is unfounded. Niko Tube and NTRP fail to establish that Article 18(3) of the basic regulation requires the institutions to reject incomplete information if the company that provided the incomplete information did not act to the best of its abilities. As regards the impact of the missing information on the injury determination, Niko Tube and NTRP have failed to show that the missing information had an impact on other relevant injury factors in such a way as to call into question the injury determination made by the institutions. The Commission states, in particular, that the data relating to VMOG Germany were in the questionnaire reply of V & M Germany.

Findings of the Court

145 The second ground of the cross-appeal is concerned with the grounds of the judgment under appeal relating to the consequences of the lack of replies to the questionnaire sent by the Commission to companies affiliated to the European Union producers. This ground of appeal is divided into nine parts. Eight of those parts are brought against paragraphs 88 to 112 of the judgment under appeal, that is to say, against the General Court's findings under the heading 'infringement of Article 3(2), (3) and (5) to (7) of the basic regulation'. The ninth part is directed at the General Court's examination, conducted in paragraphs 130 to 135 of the judgment under appeal, of the infringement of Article 19(3) of the basic regulation.

146 It is appropriate to examine together the eight parts of the second ground of the cross-appeal, alleging errors of law which vitiated the examination of Niko Tube's and NTRP's plea in law alleging infringement of Article 3(2), (3) and (5) to (7) of the basic regulation and thus the determination of material injury.

147 In the present case, it should be noted that the anti-dumping duty imposed on Niko Tube and NTRP was determined in accordance with their dumping margin, namely 25.7%, and not in accordance with the injury margin of 57%, since Article 9(4) of the basic regulation states that the lowest duty is to be used and the injury margin was higher than the dumping margin. In paragraph 111 of the judgment under appeal, the General Court considered that, even if the injury margin was based on the transfer prices charged by the European Union producers in relation to VMOG United Kingdom, Productos Tubulares and the companies affiliated to Dalmine, sales to those companies represented, at most, 10% of the total sales of that industry sector of the European Union. According to the General Court, it would therefore have been necessary for the sales prices charged by those affiliated companies to have been totally disproportionate in relation to those of the other sales taken into account in the calculation of the injury margin for the latter to be brought to a level below that of the dumping margin. Consequently, in paragraph 112 of the judgment under appeal, the General Court found that the Council did not make a manifest error of assessment in holding that the fact that the companies affiliated to the European Union producers did not submit replies to the questionnaire did not distort the determination of the injury or the calculation of the injury margin, and that the Council did not infringe Article 3(2), (3), (5), (6) and (7) of the basic regulation.

148 By the first part of the ground of appeal under consideration, Niko Tube and NTRP claim, in essence, that the General Court failed to correctly examine the plea raised at first instance, alleging an infringement of Article 3(2) of the basic regulation in that it made that infringement subject to compliance with Article 18(3) of that regulation. In addition, Article 3(2) of the basic regulation requires that the determination of injury is to be based on positive evidence. In the submission of Niko Tube and NTRP, if the General Court had applied the correct criterion and had examined the

extent of the data which was missing as a result of the failure of the European Union industry to cooperate in the present case, it would have found that the determination of the material injury was not supported by positive evidence. In the view of Niko Tube and NTRP, other factors indicate that the general level of failure to cooperate was closer to 20%.

149 It is apparent from paragraph 89 of the judgment under appeal that the General Court examined, in response to the arguments raised in that regard at first instance by Niko Tube and NTRP, whether the fact that the companies affiliated to the sampled Community producers did not lodge a reply to the questionnaire implied, on the part of those producers, a lack of cooperation which distorted the analysis of the injury, contrary to Article 3(2), (3), (5), (6) and (7) of the basic regulation.

150 The General Court rightly observed, in paragraph 90 of the judgment under appeal, that it follows from Article 18(3) of the basic regulation that information presented in a form, or in the context of a document, other than a reply to the Commission's questionnaire does not have to be ignored where the conditions set out in that article are satisfied. In paragraph 91 of the judgment under appeal, the General Court thus held that, where a party has failed to lodge a reply to the questionnaire, but has supplied information in the context of another document, it cannot be accused of lack of cooperation if, first, any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding; secondly, the information is submitted in good time; thirdly, it is verifiable; and fourthly, the party has acted to the best of its ability.

151 In the light of those findings, the General Court rightly found, in paragraph 92 of the judgment under appeal, that a sampled European Union producer will not be regarded as not cooperating if the deficiencies in the production of the data, resulting from the failure to lodge a reply to the Commission's questionnaire by a company affiliated to that producer, have no significant impact on the running of the investigation.

152 It follows that the General Court did not infringe Article 3(2) of the basic regulation as alleged by Niko Tube and NTRP in the context of the first part of the ground of appeal under assessment, in particular in so far as it decided, pursuant to Article 18(3) of the basic regulation, that the data relating to such a producer must not automatically be excluded from that taken into account to calculate the injury incurred by the European Union industry. Consequently, the first part of this ground of appeal must be rejected.

153 Before turning to the other parts of the ground of appeal under assessment, it should be noted that the General Court rightly found, in paragraph 111 of the judgment under appeal, in relation to the injury margin, that 'pursuant to Article 9(4) of the basic regulation, which lays down the lesser-duty rule, the injury margin is used to determine the rate of anti-dumping duty only if the dumping margin is higher than it is. In this case, the rate of the anti-dumping duty imposed on the [Niko Tube and NTRP] was based on [their] dumping margin, namely 25.7%, and not on the injury margin of 57%'.

154 The General Court continued by stating that, '[a]ssuming the injury margin was based on the transfer prices charged by the Community producers in relation to VMOG United Kingdom, Productos Tubulares and the companies affiliated to Dalmine, sales to those companies represented at most 10% of the total sales of the Community industry. It would therefore have been necessary, as the Council points out, for the sales prices charged by those affiliated companies to have been totally disproportionate in relation to those of the other sales taken into account in the calculation of the injury margin for the latter to be brought to a level below that of the dumping margin'.

155 Those findings of the General Court are well founded and, moreover, as noted by the Advocate General in point 256 of his Opinion, Niko Tube and NTRP do not invoke any error of law vitiating the reasoning of the General Court set out in paragraph 111 of the judgment under appeal.

156 As the Advocate General also stated, in point 254 of his Opinion, it is only if the General Court's analysis was vitiated by an error of law that the other complaints against the General Court's findings relating to the determination of the injury could be relevant. It should be added, in that regard, that the General Court also found, in paragraph 102 of the judgment under appeal, that the purchases of the product concerned by Acesa represented only 1% of the total of the sales of the Community producers and, in paragraphs 98 and 103 respectively of the judgment under appeal, that the sales and production figures of VMOG Germany and the sales volume of Almesa were already taken into account in the data provided by V & M Germany and Tubos Reunidos SA.

157 Thus, the second and sixth parts of the ground of appeal under consideration concern the General Court's rejection of the pleas raised by Niko Tube and NTRP at first instance, which related exclusively to the treatment of data concerning the affiliated companies explicitly referred to by the General Court in paragraph 111 of the judgment under appeal, or to one of the three affiliated companies referred to in paragraph 156 above. Yet, it is precisely those companies, each related to another European producer, which are referred to, in paragraphs 93 and 94 of the judgment under appeal, as being the companies which failed to respond to the Commission's questionnaire, at least in good time.

158 Therefore, it must be found that, even if the grounds raised by Niko Tube and NTRP, in the context of parts two to six of the ground of appeal under consideration, were to be declared well founded, that would vitiate the lawfulness of the operative part of the judgment under appeal and thus lead to the setting aside of that judgment only in so far as it calls into question the General Court's grounds, set out in paragraphs 98, 102, 103 and 111 of the judgment under appeal, regarding the marginal nature of the transactions relating to the product concerned performed by the affiliated companies at issue or the fact that those transactions were integrated into the data submitted to the Commission by their parent companies, and in respect of which it is neither disputed nor disputable that they did not have a decisive influence over the calculation of the anti-dumping duty. It follows from this that the second ground of the cross-appeal, supposing that one of parts two to six thereof were well founded, cannot in any event lead to the setting aside of the judgment under appeal, with the result that the second ground of appeal is ineffective. Consequently, parts two to six thereof must be rejected.

159 By the seventh part of the present ground of appeal, Niko Tube and NTRP allege a failure to sate reasons and a misassessment on the part of the General Court in that, in support of its decision, it relied on certain items of evidence rather than others, without justifying its choices. In addition, the General Court distorted the evidence which Niko Tube and NTRP furnished in support of their position.

160 In that regard, it should be noted that it is not the task of the Court of Justice on appeal to substitute its own assessment of the evidence for that made by the General Court. In that regard, it is not for the Court of Justice to criticise the choices made by the General Court in the context of that examination, in particular where it decides to rely on certain items of evidence before it and to reject others, except where it finds that the General Court distorted the evidence by misinterpreting its clear content. That is not the case here since, in the context of that part of the present plea, Niko Tube and NTRP accuse the General Court solely of having made arbitrary choice between allegedly contradictory evidence, but do not allege that the findings at issue contradict the evidence on which the General Court based its decision.

161 As regards the alleged failure to state reasons, it is not for the Court of Justice to require the General Court to provide reasons for each of its choices where it relies on one item of evidence as opposed to another in support of its decision. To decide otherwise would, once again, be tantamount to the Court of Justice substituting its own assessment of that evidence for that made by the General Court, which it is not empowered to do. It follows from the foregoing that the seventh part of the second ground of the cross-appeal must be rejected.

162 Niko Tube and NTRP submit, in the eighth part of the ground of appeal under consideration, that the General Court did not address the additional plea raised by them before it, alleging an infringement of their rights of defence. However, it is apparent from points 55 and 56 of Niko Tube's and NTRP's reply, at first instance, that the argument raised before the General Court concerned the application of Article 19(3) of the basic regulation, and not an infringement of their rights of defence.

163 By the ninth part of the same ground of appeal Niko Tube and NTRP raise other complaints related directly to the alleged infringement of Article 19(3) of the basic regulation, that is to say (i) that the General Court relied on false conclusions as they were based on a statement of reasons and evidence submitted out of time, (ii) that it did not examine whether the non-confidential summaries of the replies given by several companies to the questionnaire were sufficient and, (iii) that it misinterpreted Article 19(3) of the basic regulation in so far as, first, the General Court did not take account of the deliberate withholding of non-confidential information and, second, Niko Tube and NTRP could have obtained a better result in the administrative procedure if they had received the confidential information in question.

164 Pursuant to Article 19(1) of the basic regulation, any information which is by nature confidential or which is provided on a confidential basis by parties to an investigation is to be treated as such by the authorities, if good cause is shown. Article 19(2) of that regulation provides, inter alia, that interested parties providing confidential information are to be required to furnish non-confidential summaries thereof. Pursuant to Article 19(3) of the basic regulation, if it is considered that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information available or to authorise its disclosure in generalised or summary form, such information may be disregarded unless it can be satisfactorily demonstrated from appropriate sources that the information is correct.

165 In the present case, the General Court held, in paragraph 130 of the judgment under appeal, that the wording of Article 19(3) of the basic regulation gave the Commission only the possibility of disregarding confidential information of which no non-confidential summary was available. In paragraph 131 of the judgment under appeal, the General Court held that use by the Commission of information of which no non-confidential summary was supplied cannot be relied upon by parties to an anti-dumping proceeding as a ground for annulment of an anti-dumping measure unless they are able to demonstrate that use of that information constituted an infringement of their rights of defence.

166 In paragraphs 132 to 135 of the judgment under appeal, the General Court inferred from those considerations that, in any event, the disclosure to Niko Tube and NTRP of the non-confidential versions of the VMOG United Kingdom questionnaire reply, the presampling questionnaire reply of Productos Tubulares and the email of 24 May 2006 did not cause the administrative procedure to have a different result, since that information had no impact on the determination of the injury.

167 It should be noted, first of all, that, in so far as Niko Tube and NTRP allege that the statement of reasons and the evidence on which the General Court relied, in paragraph 135 of the judgment under appeal, were submitted out of time, referring to paragraphs 101, 107 and 108 of that judgment, they merely note that they contested the findings made in those paragraphs elsewhere in their appeal, without raising a separate complaint for the purposes of the present ground of appeal.

168 Firstly, Niko Tube and NTRP criticise the General Court for not checking, as regards the list of documents set out in paragraph 132 of the judgment under appeal and in respect of which the General Court noted that non-confidential summaries had been prepared, whether those summaries would have allowed them to have sufficient knowledge of the essential content of the documents in question.

169 As the Commission argued in its response to the cross-appeal, that line of argument cannot be linked to the plea raised at first instance, which related simply to the inadmissibility of those documents as evidence, on the ground that those documents contained confidential information of which no confidential summary had been prepared. It thus did not fall to the General Court, after finding that non-confidential summaries had been prepared in accordance with Article 19(2) of the basic regulation, to check the content of each of those documents. Accordingly, that argument cannot succeed in the context of this appeal.

170 Secondly, Niko Tube and NTRP claim, in essence, that the General Court did not examine the real complaint, alleging infringement of Article 19(3) of the basic regulation, but merely assessed whether the use by the Commission of the confidential information listed in paragraph 133 of the judgment under appeal, in the absence of non-confidential versions of that information, constituted an infringement of their rights of defence.

171 In that regard, it is important to bear in mind that Article 19(3) of the basic regulation governs the relationship between an interested party who supplies confidential information without wishing to authorise its disclosure even in generalised or summary form and the institution responsible for the anti-dumping investigation, which may decide that the information may be disregarded unless it can be satisfactorily demonstrated from appropriate sources that the information is correct. Once the institution responsible for the investigation has decided that the information in question can be used, which the basic regulation allows it to do, the question which remains, as regards the other interested parties involved in the investigation, is precisely whether such use is capable of affecting their rights of defence.

172 It is true, as noted by the Advocate General in point 293 of his Opinion, that the General Court did not formally reclassify the plea raised by Niko Tube and NTRP at first instance, alleging an infringement of Article 19(3) of the basic regulation, as, in reality, alleging an infringement of the rights of the defence, but those companies cannot complain that it did not do so. By checking, in paragraphs 133 to 135 of the judgment under appeal, whether the Commission's use of the confidential information listed in paragraph 133 of the judgment under appeal, in the absence of non-confidential versions, resulted in an infringement of the rights of the defence, the General Court interpreted that plea of annulment so as to render it meaningful, which is what it was required to do.

173 Thirdly, Niko Tube and NTRP claim that the General Court could not conclude, as it did, in their view, in paragraph 135 of the judgment under appeal, that there was no likelihood that disclosure to those companies of the non-confidential versions of the VMOG United Kingdom questionnaire reply, the presampling questionnaire reply of Productos Tubulares and the email from Dalmine of 24 May 2006 concerning the company Tenaris West Africa could have caused the administrative procedure to have a different result.

174 In that regard, it must be borne in mind that, after identifying the abovementioned documents, in paragraph 133 of the judgment under appeal, of which no non-confidential summary had been prepared, the General Court stated, in paragraph 134 of the judgment under appeal, that, in accordance with the case-law of the Court of Justice, infringement of the right of access to the investigation file could result in the annulment of the contested regulation only if there was a chance, albeit slight, that disclosure of the documents in question might have caused the administrative procedure to have a different result if the undertaking concerned had been able to rely on them during that procedure. That finding is untainted by an error of law.

175 Applying that test to the present case, the General Court held, in paragraph 135 of the judgment under appeal, that 'in this case, [Niko Tube and NTRP] argue that they needed those documents in order to prove that the lack of questionnaire replies from VMOG United Kingdom, [Productos Tubulares] and Tenaris West Africa distorted the analysis of the injury. However, this Court has held in paragraphs 101, 108 and 107 respectively that the Council did not make any manifest error of

assessment by holding that non-submission of questionnaire replies from Productos Tubulares, VMOG United Kingdom and Tenaris West Africa, or failure to take those replies into account, had no impact on the determination of the injury. Therefore, there was no likelihood that disclosure to [Niko Tube and NTRP] of the non-confidential versions of the VMOG United Kingdom questionnaire reply, the presampling questionnaire reply of Productos Tubulares and the email of 24 May 2006 could have caused the administrative procedure to have a different result'.

176 In challenging that conclusion, Niko Tube and NTRP merely submit in their cross-appeal, even though it is undisputed that they could have acquainted themselves with the documents in question in the course of the proceedings before the General Court, that it is very likely that with the submission in good time of the relevant information it would have been possible to put forward arguments and evidence capable of changing the result and that it is only by having that information available that they could have chosen whether or not to express a view. Those statements do not satisfy the requirement of establishing the existence of an error of law tainting the reasoning of the General Court. Nor do they contain the slightest indication that the latter distorted the evidence, with the result that the communication to Niko Tube and NTRP of the documents in question during the administrative procedure would have been likely to cause that procedure to have a different result from that which it reached.

177 Fourthly, it is necessary to reject the argument that the General Court infringed the rights of defence of Niko Tube and NTRP in paragraphs 132 and 135 of the judgment under appeal. First, paragraph 132 merely lists the confidential documents for which a non-confidential version was prepared and those for which no such version was drawn up. Second, as Niko Tube and NTRP have acknowledged in paragraphs 194 and 209 of their cross-appeal, those companies were able, in the course of the proceedings before the General Court, to submit observations on the documents referred to in paragraph 135 of the judgment under appeal.

178 For all of the above reasons, the ninth part of the second ground of the cross-appeal must be rejected and, therefore, that ground of appeal must be dismissed in its entirety.

*The third ground of the cross-appeal*

Arguments of the parties

179 In relation to the partial rejection of the fourth plea which they raised in support of their action at first instance, Niko Tube and NTRP argue that the General Court erred in law when it decided that Sepco had acted as an agent working on a commission basis. The fact that the shareholding relations were not the same between Sepco and Niko Tube as those between Sepco and NTRP does not mean, in law, that Sepco exercised the functions of an agent working on a commission basis in its relations with Niko Tube. In the opinion of Niko Tube and NTRP, the mere existence of a buying and selling relationship between an exporter and its affiliated distribution company is not sufficient to treat the margin of the latter company as a commission, within the meaning of Article 2(10)(i) of the basic regulation. The relevant test is whether the functions exercised by the distribution company are similar to those exercised by a commission agent. In any event, the General Court's findings concerning Niko Tube are incorrect in so far as they rely on facts and arguments submitted after the close of the administrative procedure.

180 The Council and the Commission consider that the third ground of the cross-appeal is inadmissible. In their view, Niko Tube and NTRP fail to furnish evidence that they are controlled by the alleged distribution company, which is a prerequisite to a finding of a single economic entity. Consequently, the General Court was correct to reject their fourth plea in law.

Findings of the Court

181 Niko Tube and NTRP essentially dispute the grounds, in paragraphs 187 to 189 of the judgment under appeal, on the basis of which the General Court rejected, in paragraph 190 of that judgment, the part of the fourth plea raised by Niko Tube, alleging a manifest error of assessment in the application of Article 2(10)(i) of the basic regulation.

182 It should be noted that, in paragraph 190 of the judgment under appeal, the General Court upheld that part of the fourth plea in so far as the Council adjusted Sepco's export price for transactions concerning pipes manufactured by NTRP. That same part was rejected as to the remainder, namely in so far as it concerns Sepco's export price adjustment for transactions concerning pipes manufactured by Niko Tube.

183 In addition, in that regard, Niko Tube and NTRP misread the judgment under appeal in claiming that the General Court held that control could not exist if Sepco and Niko Tube had the same 'final beneficiaries'. Indeed, in paragraphs 188 and 189 of the judgment under appeal, the General Court merely ascertained whether, as Niko Tube and NTRP claimed, SEPCO was controlled by Niko Tube or whether they were both subject to common control by reviewing the capital structure of those companies. The General Court did not rule that control could exist only if the two companies in question had the same 'final beneficiaries' and that argument must therefore be rejected.

184 Niko Tube and NTRP also misinterpret paragraph 187 of the judgment under appeal by claiming that the General Court found that the mere existence of a buying and selling relationship between an exporter and its affiliated distribution company sufficed for the profit margin of the latter to be treated as a commission. The relevant passage of the judgment under appeal states that such a relationship has no relevance in demonstrating that Sepco carries out functions comparable to those of an agent working on a commission basis. Moreover, it does not relate to the transactions carried out by Sepco for Niko Tube, but to those carried out by that company for NTRP.

185 In fact, the reasons which led to the rejection of the argument of Niko Tube and NTRP are not based on whether or not a buying and selling relationship existed between the producer and the affiliated company, but on the absence of conclusive evidence of any control by Niko Tube over Sepco or of common control over those two companies. In that regard, Niko Tube and NTRP have not stated which evidence in the file the General Court distorted or failed to take into consideration which could have cast doubt on its finding, set out in paragraphs 188 and 189 of the judgment under appeal, that, in essence, the fact that Niko Tube and NTRP had three common shareholders, including the parent company of NTRP, did not demonstrate that Sepco was under the control of Niko Tube or that there was a control common to both companies, but merely established the existence of an indirect connection between the latter two companies.

186 The mere fact that the General Court failed to respond to the argument that Sepco's representatives were present during the on-the-spot checks at the premises of Niko Tube during the investigation procedure does not prove anything in itself and does not call that analysis into question.

187 Finally, Niko Tube and NTRP do not specify the new evidence on which the General Court relied to reject, in part, their plea at first instance.

188 In the light of the foregoing, the third ground of the cross-appeal, alleging errors of law committed in the application of Article 2(10)(i) of the basic regulation in respect of transactions carried out by Sepco concerning pipes produced by Niko Tube, must be rejected.

## Costs

189 The first paragraph of Article 122 of the Rules of Procedure of the Court of Justice provides that, where the appeal is unfounded or where it is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, the first subparagraph of Article 69(3) of those rules provides that, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. Since all parties have been unsuccessful in part, they must be ordered to bear their own costs relating to the appeal proceedings.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the main appeal of the Council of the European Union;**

2. **Dismisses the main appeal of the European Commission;**

3. **Dismisses the cross-appeal of Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT);**

4. **Orders the parties to bear their own costs.**

[Signatures]